

LAW OFFICES OF PATRICIA RODRIGUEZ

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Attorneys for Plaintiffs

MONIQUE & GREGG ATWELL

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

MONIQUE ATWELL, an individual;

GREGG ATWELL, an individual;

Plaintiffs,

v.

CMG MORTGAGE, INC. a Business  
entity, form unknown; MORTGAGE

ELECTRONIC REGISTRATION

SYSTEMS INC., a Business entity,

form unknown; UNITED ESCROW

COMPANY, a Business entity, form

unknown; ALL FUNDS MORTGAGE,

a Business entity, form unknown;

LAWYERS TITLE, a Business entity,

form unknown; BANK OF AMERICA

HOME LOAN, a Business entity, form

unknown; AURORA LOAN

SERVICES, LLC, a Business entity, a

form unknown; QUALITY LOAN

SERVICE CORP., a Business entity,

form unknown; and Does 1-100

inclusive,

Defendants.

) Case No. CV11-02711-DSF-MAN

) Hon. Dale S. Fischer

) NOTICE OF MOTION AND MOTION  
) TO VACATE DISMISSAL

) [Filed concurrently with Declaration of  
) Patricia Rodriguez, Esq. in Support  
) Thereof; [Proposed] Order]

) Date: June 6, 2011

) Time: 1:30 PM

) Courtroom: 840

) Complaint Filed: March 15, 2011

1 TO THE HONORABLE COURT, ALL PARTIES AND THEIR ATTORNEYS  
2 OF RECORD:

3 Please take notice that on June 6, 2011, at 1:30 p.m., in Courtroom 840 of  
4 the above-entitled Court, Plaintiffs, Monique Atwell and Gregg Atwell  
5 (Hereinafter referred to as "Plaintiffs"), in Case No. 2:11-cv-02711-DSF-MAN  
6 will move for an order vacating the May 5, 2011 Order of Dismissal.

7 This Motion is made pursuant to Rule 60(b) of the Federal Rules of Civil  
8 Procedure on the grounds that mistake, inadvertence, and excusable neglect  
9 occurred thereby denying Plaintiffs reasonable time with which to oppose  
10 Defendants' 12(B)(6) Motion to Dismiss.

11 The Motion will be based on this Notice of Motion, on the accompanying  
12 Declaration of Patricia Rodriguez, Esq. and the Memorandum of Points and  
13 Authorities served and filed herewith, on the papers and records on file in both the  
14 above-entitled actions, and upon such evidence as may be presented at the hearing  
15 for the Motion.  
16

17  
18 Dated: May 6, 2011

19 LAW OFFICES OF PATRICIA RODRIGUEZ

20 By: 

21 Patricia Rodriguez, Esq.  
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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**  
**MOTION TO VACATE DISMISSAL**

**I. INTRODUCTION**

On March 15, 2011, Plaintiffs filed an action against all named Defendants for conducting an unlawful and improper foreclosure process on their home located at 4018 Redwood Ave #C, Los Angeles, CA 90066 (Hereinafter "Home"). That action was filed in the Superior Court of the County of Los Angeles, and was assigned a case number of BC457277. On March 31, 2011, Defendants Aurora Loan Services and MERS Inc. removed that case to the federal court, and received a case number of 2:11-CV-02711-DSF-MAN. That is the instant matter. Soon thereafter, on April 12, 2011, Defendants Aurora Loan Services and MERS Inc. filed a Motion to Dismiss Plaintiff's Complaint. The Motion hearing date was set for May 16, 2011 at 1:30 PM before the Honorable Judge Dale S. Fischer. Defendant BAC Home Loan Servicing joined in that Motion on April 19, 2011.

At the same time, on April 1, 2011, Defendant CMG Mortgage Inc., a party to the original complaint numbered BC457277 filed in the Superior Court, also removed the case to federal court. However, when CMG Mortgage Inc. removed the case, an entirely new case assignment was received, that being case number CV11-2782-SJO. The judge recused himself, and the case was assigned to the Honorable Percy Anderson under the new number of CV11-02782-PA-MAN. Subsequently, on April 13, 2011, Defendants CMG Mortgage Inc. filed their Motion to Dismiss Plaintiff's Complaint, set for hearing on May 16, 2011 before Judge Percy Anderson.

Thereafter, on or about the end of April, Plaintiffs chose to substitute their former counsel, Richard A. Miller, Esq. of Richard A. Miller Law Offices for that of attorney Patricia Rodriguez, Esq. of The Law Offices of Patricia Rodriguez.



1 Plaintiffs filed their Substitutions of Attorney for Patricia Rodriguez on April 26,  
2 2011. *See Exhibit "A" to Declaration of Patricia Rodriguez.*

3 **II. PLAINTIFFS' DESIRE TO AMEND THE COMPLAINT FOR**  
4 **JUDICIAL EFFICIENCY**

5 Plaintiffs' Opposition to the Motion to Dismiss filed by Defendants Aurora  
6 Loan Services, LLC and Mortgage Electronic Registration Systems, Inc. was due  
7 on April 25, 2011, one day prior to Plaintiffs retention of Patricia Rodriguez, Esq.  
8 Not having been formally retained until after the filing deadline, Plaintiffs' counsel  
9 was unable act on plaintiffs' behalf by responding to the motion and on May 5,  
10 2011, pursuant to Local Rule 7-12; the Court granted Defendants' Motion to  
11 Dismiss. *See Exhibit "B" to Declaration of Patricia Rodriguez.*

12 Rule 60(b) of the Federal Rules of Civil Procedure permits that "on motion  
13 and just terms, the court may relieve a party or its legal representative from a final  
14 judgment, order, or proceeding for...mistake, inadvertence, surprise, or excusable  
15 neglect" as well as "any other reason that justifies relief." As aforementioned,  
16 Plaintiffs and their counsel were in a transitional state which proved  
17 disadvantageous to claimants by disallowing their counsel due time to properly  
18 respond to Defendants' motion.  
19

20 As will be discussed below, the reason for not filing Opposition papers was  
21 because Plaintiffs' newly retained counsel, the Law Offices of Patricia Rodriguez,  
22 were in the process of preparing their First Amended Complaint. Plaintiffs did not  
23 want to burden the court with papers Opposing the Motion to Dismiss, only to  
24 shortly thereafter file an Amended Complaint, which would have taken the Motion  
25 to Dismiss action off calendar. Thereafter, opposing counsel would likely have  
26 Motioned to Dismiss that First Amended Complaint as well, in which case  
27 Plaintiffs would have again filed Opposition papers. Plaintiffs' non-action in this  
28 case was more related to making sure that the proper counsel was substituted in



1 before contacting opposing counsel rather than a reckless disregard for the timing  
2 rules regarding motions.

3 Furthermore, pursuant to the Standing Order of this Court, Paragraph 8,  
4 Section A: "See *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996) (where a  
5 motion to dismiss is granted, a district court should provide leave to amend unless  
6 it is clear that the complaint could not be saved by any amendment)." (SO, 9) On  
7 May 5, 2011, counsel for Plaintiffs and Defendants, Patricia Rodriguez and  
8 Charles Bell, of McCarthy and Holthus LLP met and conferred pursuant Local  
9 Rule 7-3 regarding the operative Complaint and our planned amendment. Counsel  
10 did not object to Plaintiffs intent to file a First Amended Complaint in advance of  
11 the May 16, 2011, Motion to Dismiss hearings thereby rendering those hearings  
12 moot. The Standing Order further recognizes that "Moreover, a party has the right  
13 to amend the complaint once before being served with a responsive pleading. Fed.  
14 R. Civ. P. 15(a)." and that "A Rule 12(b)(6) motion is not a responsive pleading  
15 and therefore plaintiff might have a right to amend. See *St. Michael's*  
16 *Convalescent Hospital v. California*, 643 F.2d 1369, 1374 (9th Cir. 1981); *Nolen v.*  
17 *Fitzharris*, 450 F.2d 958, 958-59 (9th Cir. 1971)." (SO, 9) Finally, the Standing  
18 Order notes that "The Ninth Circuit requires that this policy favoring amendment  
19 be applied with "extreme liberality." (SO, 9)

21 Since Plaintiffs have a right to amend the complaint once before being  
22 served with a responsive pleading, and Defendants' Rule 12(b)(6) Motion to  
23 Dismiss is not a responsive pleading, Plaintiffs should be given an opportunity to  
24 amend the original complaint. This is particularly true considering that Plaintiffs  
25 have only recently retained the Law Offices of Patricia Rodriguez as counsel in  
26 this matter.  
27  
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1 Plaintiffs therefore ask this Court to be given that opportunity to amend the  
2 original complaint, and will have that First Amended Complaint prepared for filing  
3 concurrently with this Motion to Vacate the Dismissal.

4  
5 **V. CONCLUSION.**

6 For the reasons set forth above, Plaintiffs respectfully request that this court  
7 grant its [Proposed] Order to Vacate the Court's May 5, 2011 Order of Dismissal.

8  
9 Dated: May 6, 2011

10 ~~LAW OFFICES OF PATRICIA RODRIGUEZ~~

11 By: \_\_\_\_\_

12 Patricia Rodriguez, Esq.  
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2 Patricia Rodriguez, Esq.

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7 Facsimile: (626) 872-2658

8 Attorneys for Plaintiffs

9 MONIQUE & GREGG ATWELL

10 UNITED STATES DISTRICT COURT  
11 CENTRAL DISTRICT OF CALIFORNIA

12 MONIQUE ATWELL, an individual;

13 GREGG ATWELL, an individual;

14 Plaintiffs,

15 v.

16 CMG MORTGAGE, INC. a Business

17 entity, form unknown; MORTGAGE

18 ELECTRONIC REGISTRATION

19 SYSTEMS INC., a Business entity,

20 form unknown; UNITED ESCROW

21 COMPANY, a Business entity, form

22 unknown; ALL FUNDS MORTGAGE,

23 a Business entity, form unknown;

24 LAWYERS TITLE, a Business entity,

25 form unknown; BANK OF AMERICA

26 HOME LOAN, a Business entity, form

27 unknown; AURORA LOAN

28 SERVICES, LLC, a Business entity, a

form unknown; QUALITY LOAN

SERVICE CORP., a Business entity,

form unknown; and Does 1-100

inclusive,

Defendants.

) Case No. CV11-02711-DSF-MAN

) Hon. Dale S. Fischer

) DECLARATION OF PATRICIA

) RODRIGUEZ, ESQ. IN SUPPORT OF

) MOTION TO VACATE DISMISSAL

) [Filed concurrently with Notice of

) Motion and Motion to Vacate

) Dismissal; [Proposed] Order]

) Date: June 6, 2011

) Time: 1:30 PM

) Courtroom: 840

) Complaint Filed: March 15, 2011

1 1. I, Patricia Rodriguez, Esq., am an attorney licensed in the State of  
2 California and in the Federal Court for the Central District of California. I am the  
3 lead attorney on this matter and could fully testify to the facts and proceedings of  
4 this case if called upon.

5 2. Towards the end of April, 2011, Plaintiffs Gregg and Monique Atwell  
6 (hereinafter "Plaintiffs") contacted my office in the hopes of retaining my firm to  
7 assist them with this case.

8 3. After some discussion, Plaintiff decided to substitute their former counsel,  
9 Richard A. Miller, Esq. of Richard A. Miller Law Offices for my firm.

10 4. My office received Plaintiffs' signed Substitutions of Attorney on or around  
11 April 25, 2011. We promptly filed the substitutions on April 25, 2011. *Attached*  
12 *hereto as Exhibit A are true and correct copies of the conformed Substitutions of*  
13 *Attorney filed with the Court on April 25, 2011.*

14 5. Plaintiffs' Opposition to the Motion to Dismiss filed by Defendants Aurora  
15 Loan Services, LLC and Mortgage Electronic Registration Systems, Inc. was due  
16 on April 25, 2011, the exact same day my office filed the Substitutions of  
17 Attorney.

18 6. On May 3, 2011, my office attempted to file a Motion to Consolidate the two  
19 Federal cases that correspond to this action and were advised that the Motion was  
20 rejected for failure to Meet and Confer pursuant to Local Rule 7-3.

21 7. The Court gave my office until May 10, 2011 to re-file the Motion to  
22 Consolidate in accordance with that Local Rule.

23 8. Accordingly, on May 5, 2011, my office met and conferred with Counsel for  
24 Defendants, Aurora Loan Services, Inc, and Mortgage Electronic Registration  
25 Systems, Inc. at which time I advised that my office intended upon filing a First  
26 Amended Complaint in advance of the May 16, 2011 Motion to Dismiss hearings.  
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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

|                                     |                                       |
|-------------------------------------|---------------------------------------|
| MONIQUE ATWELL, an individual;      | ) Case No. CV11-02711-DSF-MAN         |
| GREGG ATWELL, an individual;        | ) Hon. Dale S. Fischer                |
|                                     | )                                     |
| Plaintiffs,                         | ) [PROPOSED] ORDER                    |
| v.                                  | )                                     |
|                                     | ) [Filed concurrently with Notice of  |
| CMG MORTGAGE, INC. a Business       | ) Motion and Motion to Vacate         |
| entity, form unknown; MORTGAGE      | ) Dismissal; Declaration of Patricia  |
| ELECTRONIC REGISTRATION             | ) Rodriguez, ESQ. in Support Thereof] |
| SYSTEMS INC., a Business entity,    | )                                     |
| form unknown; UNITED ESCROW         | ) Complaint Filed: March 15, 2011     |
| COMPANY, a Business entity, form    | )                                     |
| unknown; ALL FUNDS MORTGAGE,        | )                                     |
| a Business entity, form unknown;    | )                                     |
| LAWYERS TITLE, a Business entity,   | )                                     |
| form unknown; BANK OF AMERICA       | )                                     |
| HOME LOAN, a Business entity, form  | )                                     |
| unknown; AURORA LOAN                | )                                     |
| SERVICES, LLC, a Business entity, a | )                                     |
| form unknown; QUALITY LOAN          | )                                     |
| SERVICE CORP., a Business entity,   | )                                     |
| form unknown; and Does 1-100        | )                                     |
| inclusive,                          | )                                     |
|                                     | )                                     |
| Defendants.                         | )                                     |

[PROPOSED] ORDER

The Court, having considered arguments on Plaintiffs' Motion to Vacate the May 5, 2011 Order of Dismissal by the Court, orders as follows:

IT IS HEREBY ORDERED that Plaintiffs' Motion is GRANTED. The Court's May 5, 2011 Order dismissing the matter is hereby vacated.

IT IS SO ORDERED.

Dated: May\_\_\_\_, 2011

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Hon. Dale S. Fischer  
Judge of the United States District Court  
Central District of California



# Exhibit A

| UNITED STATES DISTRICT COURT<br>CENTRAL DISTRICT OF CALIFORNIA  |  |
|---|--|
| Monica Arzola, an individual, and Craig<br>Alvarez, an individual<br><div style="text-align: right; font-weight: bold;">Plaintiff</div>   | <div style="text-align: right;">CV11-02711 DSF</div> |
| CDO Mortgage, Inc. a Business entity, (and<br>unknown, et. al)<br><div style="text-align: right; font-weight: bold;">Defendant(s)</div>   | <b>SUBSTITUTION OF ATTORNEY</b>                      |
| I, <u>Monica Arzola</u> <span style="float: right;"><input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Other</span><br>hereby substitutes <u>Patricia Rodriguez</u> who is<br><span style="float: right;">[X] Retained Counsel <input type="checkbox"/> Court Appointed Counsel <input type="checkbox"/> Pro Per <u>735 East Main</u></span><br><u>San Jose, CA 95128</u> <span style="float: right;">626-455-5255 <u>626-272-2658</u> 55 attorney</span><br>of record in the piece and stead of <u>Nicholas Miller</u><br><span style="float: right;">626-455-5255 <u>626-272-2658</u> 55 attorney</span><br>Date: <u>4/25/11</u> <span style="float: right;"></span><br>I have given proper notice pursuant to Local Rule 8.3-3.2 and further consent to the above substitution.<br>Date: <u>4-25-11</u> <span style="float: right;"></span><br>I am duly admitted to practice in this District pursuant to Local Rule 8.3-2.8.<br>Date: <u>4/25/11</u> <span style="float: right;"></span><br>Substitution of Attorney is hereby <input type="checkbox"/> Approved, <input type="checkbox"/> Denied.<br>Date: _____ <span style="float: right;">United States District Judge</span><br>NOTICE TO COUNSEL: If you are currently enrolled in the Optical Scanning Program and have changed your firm's name or e-mail address, please provide the court with your new e-mail address and phone number to ensure that documents are served to the proper person. This form is available on the Court's website at www.cred.uscourts.gov. |  |

SUBSTITUTION OF ATTORNEY



| UNITED STATES DISTRICT COURT<br>CENTRAL DISTRICT OF CALIFORNIA  |                               |
|---|-------------------------------|
| Monique Atwell, an individual, and Gregg Atwell, an individual<br><br>Plaintiff(s)  | CASE NUMBER<br>CV11-02711 DSF |
| SUBSTITUTION OF ATTORNEY  |                               |
| CMG Mortgage, Inc, a Business entity, form unknown, et. al.<br><br>Defendant(s)   |                               |
| Gregg Atwell<br><small>Name of Party</small> <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Other  |                               |
| hereby substitutes <u>Patricia Rodriguez</u> who is   |                               |
| <input checked="" type="checkbox"/> Retained Counsel <input type="checkbox"/> Court Appointed Counsel <input type="checkbox"/> Pro Per <u>730 East Main</u>   |                               |
| <u>Pasadena, CA 91101</u> <u>626-899-8275</u> <u>626-873-1638</u><br><small>City, State, Zip Code Telephone Number California Number</small>  |                               |
| as attorney of record in the place and stead of <u>Richard Miller</u>   |                               |
| Dated: <u>4-25-11</u><br><br>Signature of Party   |                               |
| I have given proper notice pursuant to Local Rule 83-2.9.2 and further consent to the above substitution.<br>Dated: <u>4-25-11</u><br><br>Signature of Present Attorney   |                               |
| I am duly admitted to practice in this District pursuant to Local Rule 83-2.8.<br>Dated: <u>4/25/11</u><br><br>Signature of New Attorney  |                               |
| Substitution of Attorney is hereby <input type="checkbox"/> Approved. <input type="checkbox"/> Denied.  |                               |
| Dated: _____<br><br>United States District Judge  |                               |
| NOTICE TO COUNSEL: If you are currently enrolled in the Optical Scanning Program and have changed your facsimile number or e-mail address since your enrollment, you must complete an Enrollment/Update Form G-16 to ensure that documents are served at the proper facsimile number or e-mail address. This form, as well as information about the Optical Scanning Program, is available on the Court's website at <a href="http://www.cacd.uscourts.gov">www.cacd.uscourts.gov</a> . |                               |
| SUBSTITUTION OF ATTORNEY  |                               |

## Exhibit B

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

MEMORANDUM

Case No. CV 11-2711 DSF (MANx)

Date 5/5/11

Title Monique Atwell, et al. v. CMG Mortgage, Inc., et al.

Present: The Honorable DALE S. FISCHER, United States District Judge

Debra Plato

Not Present

Deputy Clerk

Court Reporter

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

**Proceedings:** (In Chambers) Order GRANTING Defendants' Motion to Dismiss  
(Docket No. 8)

Defendants Aurora Loan Services, LLC and Mortgage Electronic Registration Systems, Inc. filed a motion to dismiss on April 12, 2011. (Docket No. 8.) Defendant BAC Home Loans Servicing, LP joined this motion on April 19, 2011. (Docket No. 10.) Plaintiffs' opposition was due April 25, 2011, but no opposition has yet been filed. The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. The hearing set for May 16, 2011 is removed from the Court's calendar.

The Court deems the lack of opposition to be consent to the motion. Local Rule 7-12; see also Ghazali v. Moran, 46 F.3d 52 (9th Cir. 1995); Brydges v. Lewis, 18 F.3d 651, 652 (9th Cir. 1993). The motion to dismiss is GRANTED.

IT IS SO ORDERED.